IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 928 OF 2005

IN
S.NDPS Case No. 412/2004

Mohd. Parvez Mohd. Istiyak Qureshi .. Applicant.

V/s.

The State of Maharashtra .. Respondent.

Shri S.M. Deshpande for the Applicant.
Shri V.B.Konde -Deshmukh, APP for Respondent -State.

CORAM : A.M.KHANWILKAR, J.
DATED : FEBRUARY 24, 2005

PC :-

1. Heard counsel for the parties.

2. The applicant is arrested in connection with C.R. No. II/172/2004, registered with Mahatma Phule Chowk Police Station for the offence punishable under the NDPS Act alongwith two other accused. The prosecution case is that on the basis of the prior information received, the raiding party proceeded at the relevant spot where the applicant alongwith two other accused were seen moving in suspicious manner. The raid was conducted and all the three accused were accosted. The prosecution case is that accused No.1

was found in possession of 1 kg.511 grams of charas, which is contraband item and commercial quantity. Similarly, accused No.2 was found in possession of 1 kg. 12 grams of charas which was again commercial quantity. So far as the applicant accused No.3 is concerned, he was found in possession of 372 grams of charas. Accepting the prosecution case as it is, it is seen that the applicant accused No. 3 was found in possession of only 372 grams of charas when all the three accused were moving together and arrested together. Thus, recovery of contraband made from all of them will have to be reckoned for the time being to consider the bail application, which is commercial quantity. The counsel for the applicant, however, submits that even if such a view is to be taken, in the present case, the applicant will have to be enlarged on bail as there is non-compliance of section 50 as well as section 42 (2) and 57 of the Act.

3. In so far as, non-compliance of section 50 is concerned, the argument is that even if the arrest panchanama is read as a whole, even then there is nothing in the said panchanama to indicate that the raiding party had informed the applicant that he had a right to be searched before the gazetted officer.

Indeed, the panchanama records that it was disclosed to the applicant that the member of the raiding party was a gazetted officer and if the applicant so desires, he can be searched before another gazetted officer. It is further contended that the search of all the three accused was conducted jointly and not separately. So far as non-compliance of section 42 (2) of the Act is concerned, the argument is that there is no clear record to indicate that prior information as received or passed on to the immediate superiors. There is no endorsement to the effect that the immediate superior has received such intimation. Besides there is discrepancy in the timing mentioned in the station diary. In the station diary there is no mention about the timing of the receipt of the prior information. In so far as, non-compliance of section 57 is concerned, it is contended that there is no report forwarded nor any endorsement is appearing in the record to indicate that compliance of section 57 has been done in the present case. It is further argued that the accused is a Muslim and is familiar only with Hindi language; Whereas the raiding party interrogated the applicant in Marathi only and the documents prepared are also in Marathi.

4. Learned APP, however, resists this application by placing reliance on the relevant materials to contend that none of the contentions raised on behalf of the applicant, as referred to above, can be accepted. According to him necessary compliance has been done, in respect of the procedure required regarding search as well as in terms of sections 57 and 42 of the Act.

5. In my opinion, the applicant ought to succeed on the first ground raised before this court that search in the present case will have to be held as illegal and, if the said search is to be discarded, then this court will have to take the view that there are reasons to believe that the applicant is not guilty of the alleged offence. The argument canvassed, is supported by the decision of the constitution Bench of the Apex Court in the State of Punjab vs. Baldev Singh, reported in (1999) 6 Supreme Court Cases 172. In para 24 of the apex court has observed :-

> "It would, thus, be seen that none of the decisions of the Supreme Court after Balbir

Singh case have departed from that opinion. At least none has-been brought to our notice. There is, thus, unanimity of judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would also render the search illegal and the conviction and sentence of the accused bad. (emphasis supplied)."

6. In the present case, it is seen that the arrest panchanama makes no reference to the fact that the applicant was clearly informed that he has a right to be searched in the presence of a gazetted officer or a Magistrate. The panchanama merely mentions that the applicant was told that the member of the raiding party was a gazetted officer and if he so desire, he can be searched before any other gazetted officer. No less and no more. If it is so, applying the above said principle laid down by the Apex Court, it will have to be held that the search of the applicant in the fact situation of the present case is illegal. This is obviously a prima facie view that I am required to express, in view of the requirement of section 37 of the Act. Indeed, the learned APP argued that whether the raiding party had substantially complied the provisions of section 50, is a matter which can be considered at the trial. That aspect can be considered at the time of the trial but for the purpose of bail application nevertheless, I have to record prima facie opinion, on the basis of the material which is filed alongwith the charge-sheet against the applicant. The material as filed and the

relevant panchanama does indicate that the applicant was not informed about his right to be searched before a gazetted officer, as has been found earlier.

7. As the search of the applicant will have to be held illegal, there is reason to believe that the applicant is not guilty of the alleged offence. On this reasoning, the applicant is entitled for bail in terms of section 37 of the Act, especially when there is nothing on record to suggest that the applicant has any antecedents. Accordingly this application succeeds and the applicant is directed to be released on the following conditions:-

(a) The Applicant is granted bail in connection with C.R.No. II/172/2004, registered with Mahatma Phule Chowk Police Station, on executing personal bond in the sum of Rs. 50,000/- (Rs. Fifty thousand only) with two local sureties in the like amount.

(b) The applicant shall report to the concerned police station once in a month on first Saturday of every English calender month between 10 p.m. to 2 p.m..

(c) The Applicant shall extend full co-operation to the trial court for early disposal of the trial. If the trial court is of the opinion that the applicant is responsible for delay in trial that fact be recorded in the Rozanama, which can be a ground for cancellation of bail.

(d) The applicant shall not influence the prosecution witness or tamper with the prosecution evidence in any manner whatsoever.

8. It is made clear that the trial court shall decide the case on its own merits in accordance with law, uninfluenced by the observations made in the present order, which are only for the purpose of considering the prayer for bail.

9. Ordered accordingly.

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